



Federal Communications Commission
Washington, D.C. 20554

August 23, 2011

In Reply Refer to
1800B3-IB

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In re: KOYD(FM), Gackle, ND
Facility ID No.166015
File No. BNPH-20060309AAE
Petition for Reconsideration of Tolling
Denial

BMPH-20110128ABF
Application for Modification

Dear Counsel:

The Audio Division of the Media Bureau ("Bureau") hereby considers a Petition for Reconsideration filed by Michael Greene ("Greene") of a staff action denying his request for additional time to construct KOYD(FM), Gackle, North Dakota. Absent favorable action, the permit would have expired on February 28, 2011. For the reasons discussed below, we deny the request.

The Bureau granted a construction permit to Andrew A. Watcher ("Watcher") on June 28, 2006, for a three-year period expiring June 28, 2009. Watcher did not construct and, on May 29, 2009, filed an application to assign the permit to Greene. Greene claimed to be an "eligible entity" which, pursuant to a rule then-newly revised in the Commission's *Diversity Order*, could receive up to 18 additional months upon consummation of an assignment.¹ The Bureau granted the assignment and adjusted the construction deadline to February 28, 2011.

¹ *In the Matter of Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5928-31 (2008) ("*Diversity Order*") revising 47 C.F.R. § 73.3598(a). Generally, "eligible entities" are defined to include all entities that qualify as small businesses under the standards of the Small Business Administration for industry groupings based on revenue. The *Diversity Order* added the following language to Section 73.3598(a): "An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license." 47 C.F.R. § 73.3598(a).

About a month after obtaining the permit, Greene learned that the authorized tower site was unavailable. Greene researched alternate locations and determined that alternative sites with existing towers were either unavailable, incapable of reaching the community of license, or too expensive. Greene considered the possibility of erecting a new tower but ruled that option out as cost-prohibitive. On January 28, 2011, Greene filed a minor modification application proposing to change the community of license from Gackle to Tower City, North Dakota, which would make it possible for him to use an existing tower that was capable of covering the latter but not the former community. It is Commission policy to publish notifications of potential community of license changes in the *Federal Register* and to provide a 60-day period for public comment on any impact of such a change. The Gackle modification application was filed only 30 days prior to the revised permit expiration of February 28, 2011, leaving insufficient time for a 60-day comment period and construction thereafter.²

Greene filed a request for tolling of the construction period on February 23, 2011. Greene detailed the permit's history, and argued that grant of additional time would be preferable to allowing the spectrum to remain fallow in sparsely populated Gackle and Tower City, which Greene states are in need of radio service. The staff denied the request by e-mail on the same day it was filed, finding that Greene had neither demonstrated circumstances for tolling nor for waiver of the construction period. In particular, the staff observed that waivers are granted for rare and unusual circumstances beyond the permittee's control, whereas several matters within Greene's control contributed to his inability to construct. For example, Greene had not done due diligence to determine site availability prior to acquiring the permit, had rejected some options for financial reasons, and filed for a community change too late to accommodate the required comment period.

Greene's primary argument on reconsideration is that the 18 additional months afforded to eligible entities is arbitrary and inconsistent with the 36 months afforded to initial permittees. Greene contends that the Commission has determined that 36 months is a reasonable construction period, and that it is, thus, unreasonable to afford only 18 months to eligible entity assignees. We begin by observing that a court recently vacated and remanded the eligible entity rule as arbitrary on other grounds³ and that the Media Bureau ("Bureau") has suspended application of the eligible entity policies in all contexts.⁴ The court found that the Commission had not explained how granting any additional time to eligible entities would further its intended purpose of diversity of ownership. In announcing the resulting course of action, the Bureau stated that vacatur does not impact the 18-month period afforded to eligible entities with assignment grants that have become final.⁵ The construction deadlines of non-final permits, however, will revert to the original pre-assignment dates.⁶ The assignment to Greene has long been final, so the KOYD(FM) permit retains the 18 additional months granted under the vacated eligible entity policy. Greene's argument that yet additional time must be afforded to eligible entities, however, is not consistent with the court's holding.⁷ While the court and Greene agree for different reasons that the

² The Bureau's practice is to aggregate requests made by different parties for community changes and, periodically, to publish them in a consolidated *Federal Register* notice. The KOYD(FM) proposal was included on such a *Federal Register* notice which was drafted prior to permit expiration but published about two weeks after permit expiration. See 76 Fed. Reg. 14394 (Mar 16, 2011).

³ *Prometheus Radio Project v. FCC*, No. 08-3078 (3d Cir. July 7, 2011).

⁴ See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, DA 11-1232, 26 FCC Rcd ____ (MB Jul. 25, 2011) ("*Eligible Entity Public Notice*").

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Greene's argument also mischaracterizes the Commission proceedings which established the three-year construction period. The Commission did *not* find 18 months an inadequate time in which to build a station. Prior to that doubling of the construction period to three years, the vast majority of permittees constructed within 18 months *i.e.*, in less time than either Watcher or Greene received. Doubling the construction period to three years made it possible to eliminate abusive requests by those who used the former extension process to warehouse

eligible entity policy is arbitrary, the court found that the record of the eligible entity rulemaking did not support the grant of *any additional time at all*, whereas Greene advocates *doubling* the extra time already provided to eligible entities. Accordingly, to the extent that Greene relies on his status as an eligible entity, we deny his request for reconsideration.

Next, we turn to those of Greene's arguments which are not specific to his receipt of an extended time for construction as an eligible entity. Greene argues that the staff erred by giving his waiver request only perfunctory treatment before it was denied, rather than the "hard look" to which it was entitled.⁸ Greene does not state what he considers "perfunctory." We surmise, however, that he might be referencing the speed and informality of the decision, which was communicated by e-mail rather than by a formal letter, on the same day that the request was filed. We have reviewed the record and find that the staff decision was quite thorough. For example, even though Greene only requested tolling treatment and clearly did not meet any of the conditions established in the tolling rule, the staff also considered on its own motion whether a waiver might be appropriate.⁹ The staff acted quickly so that Greene, who filed the tolling request only five days prior to permit expiration, would learn of the decision while time still remained in which to explore any other available options to save the permit.¹⁰ The five paragraph e-mail decision outlined the grounds for tolling and waiver of the broadcast construction deadlines, reviewed the circumstances Greene presented, and explained why tolling and waiver were not appropriate to those circumstances. It is clear from the decision that Greene's request was afforded a "hard look."

One basis for the staff's waiver denial was that Greene's failure to timely construct was not entirely beyond his control because "due diligence concerning continued site availability was not undertaken prior to consummation." Greene argues that he should be considered diligent because he waited a mere 30 days after consummation to contact the site owner. The Commission, however, expects permittees to take basic steps to ensure that their sites are suitable and available *before* filing an application.¹¹ Here, Greene filed an assignment application on May 20, 2009 and consummated the sale on August 29, 2009, but did not consider whether the site was still available until late September 2009. Thus, a part of the reason that Greene was unable to construct within the given period was within his control – Greene never investigated whether the tower site was available before entering into an agreement to purchase the station. Had Greene looked into this very fundamental matter, and nevertheless decided to purchase a station without a viable site, he would have had 4-plus extra months to devise a solution.¹² That amount of time would have, for example, allowed for an earlier filing of an application for a community change with sufficient time for public comment.

spectrum, while providing a built-in safety valve sufficient for diligent permittees that encountered routine problems. See *Streamlining of Mass Media Applications*, Report and Order, 13 FCC Rcd 23056, 23091 (1998), *aff'd*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539-40 (1999) ("*Streamlining*"). The Commission's later decision in the *Diversity Order* to provide an additional 18 months to eligible entities was an attempt to promote diversity of broadcast ownership through leniency.

⁸ Petition at 6-7 citing *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224-25 (D.C. Cir. 1999) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁹ However, his request did not outline any grounds for tolling under Section 73.3598(b) of the Rules. Nor does the Commission grant extensions, except (at that time) upon assignment to an eligible entity, which had already occurred.

¹⁰ Greene provided staff with a courtesy copy of his request by e-mail on Tuesday, February 22, 2011, and filed the request on Wednesday, February 23, 2011. The permit was due to expire at on Monday, February 28, 2011. The staff thus noted "As the permit expires next week, I am responding by e-mail in the interest of time." In this manner, time would remain for Greene and his counsel to confer with Commission staff about any other options to save the permit before the agency closed for the weekend: "I suggest that you call [engineering staff] to brainstorm whether there might be any potential engineering solutions capable of saving the permit."

¹¹ *E.g.*, *Streamlining*, 14 FCC Rcd at 17539-40.

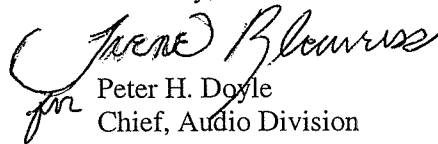
¹² See *Birach Broadcasting Corp.*, Order on Reconsideration, 20 FCC Rcd 5764, 5766 (2005) ("We reiterate that we expect applicants and parties interested in acquiring outstanding construction permits to determine the viability of the proposed site prior to filing their initial applications with the Commission").

Greene also argues that the Bureau's decision not to waive the construction deadline was inconsistent with Commission precedent. Although Greene cites several cases for the general proposition that the Commission waives its rules and policies when appropriate, those cases do not support a waiver on the current facts. Two cases cited by Greene have little, if anything, to do with construction deadlines.¹³ Greene also seeks to show that the Commission has not been strict about construction deadlines because it allowed Greene to acquire KOYD(FM) in August 2009, even though the permit bore an expiration date of June 2009. There, however, the staff acted pursuant to a 2009 public notice which established a short transition period, in which eligible entities filing assignment applications prior to permit expiration could consummate after permit expiration and nevertheless receive the benefits of the then-new 18-month extension for construction permits.¹⁴ There is no similar policy or public notice that would allow additional leniency at this time.

Greene's argument that it could take considerable time to include the Gackle allotment in a new auction, and to have a new bidder construct provides no grounds for waiver. The Commission has previously rejected such arguments.¹⁵ Finally, Greene argues that the new proposed community of license, Tower City, has experienced flooding. Even if that matter, which was not raised previously, were now considered it would be irrelevant to the matter at hand. Flooding is grounds for tolling only if it directly encumbers construction.¹⁶ Any Tower City flooding occurred in a community not yet authorized and has not been shown to encumber construction in the authorized community of Gackle.

Accordingly, Greene's Petition for Reconsideration of the denial of tolling IS DENIED. The permit to construct KOYD expired on February 28, 2011. Accordingly, the application to modify the expired permit IS DISMISSED AS MOOT.

Sincerely,


for Peter H. Doyle
Chief, Audio Division
Media Bureau

¹³ In *Big Island Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 422 (1991), the Commission waived its engineering rules to allow a booster station to operate beyond the predicted contour of its primary station, when the new area to be served was prone to natural disasters. In *Connoisseur Media, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 1707 (WTB 2011), the Wireless Telecommunications Bureau waived the auction rules to permit the return of a multi-million dollar auction payment for a radio station that could not be built despite significant efforts by the permittee to address concerns of the Federal Aviation Administration (FAA) and military of potential interference with communications needed to safely control air navigation. Though not specifically addressed in that decision, the Media Bureau had waived the construction period prior to the permittee's finding that there was no viable interference solution. However, Greene has not shown any factual similarities to the current case.

¹⁴ *Media Bureau Provides Guidance on Requests for Additional Time to Construct New Broadcast Stations Assigned to Eligible Entities*, Public Notice, 24 FCC Rcd 4116 (MB 2009).

¹⁵ E.g., *Birach*, *supra*, 20 FCC Rcd at 5766.

¹⁶ 47 C.F.R. § 73.3598(b).